

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2153 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

NITINKUKMAR THAKORLAL PATEL

Versus

STATE OF GUJARAT

Appearance:

MR HB SHAH for Petitioner

Mr. P.S. Champaneri, A.G.P. for Respondents

CORAM : MR.JUSTICE S.M.SONI

Date of decision: 16/04/96

ORAL JUDGEMENT

Petitioner, by this petition, has challenged the legality and propriety of the orders, Annexures D & C, on the ground that Annexure D is illegal, ultra vires and void inasmuch as Annexure C is also arbitrary, illegal and unreasonable and cannot be made to affect the vested right of the petitioner.

Few facts to appreciate the contentions of the parties are required to be stated. Petitioner initially

qualified as Tracer was selected and appointed as Tracer by an order of respondent no.2 dated 4.4.83. He resumed duty and was discharging the same satisfactorily. He was taken on work-charged establishment of Narmada Project, which was likely to take 15 to 25 years for its completion. In view of this fact, his services may be required for a long period. Petitioner was appointed on probation for two months and on completion of the said probation period satisfactorily, by an order dated 4.7.83, he was placed on long term basis. Respondent no.2 then made an order modifying the terms of appointment of the petitioner, which changed even the qualification. The said order was passed on 7.2.84 i.e. practically after eight months. The petitioner was not fulfilling the revised qualifications and, therefore, his services were terminated by order dated 18.4.84, which was served on the petitioner on 21.4.84. The said order of termination and also the order modifying the conditions of appointment are under challenge in this petition.

The respondents, though duly served of the rule, have not filed any affidavit-in-reply.

Learned counsel Mr.H.B. Shah contended before the court that issuance of Annexure C adversely affecting the petitioner is illegal and unconstitutional inasmuch as the same adversely affects the vested right created in favour of the petitioner on appointment. He further contended that when the petitioner was appointed on having satisfied the necessary requirements of service, the same cannot be changed to adversely affect his vested right created on appointment. To substantiate this contention, he has relied on two judgments, one in the case of P. Mahendra & Ors vs. State of Karnataka (A.I.R. 1990 SC 405) and another in the case of N.T. Bevin Katti vs. Karnataka Public Service Commission (A.I.R. 1990 SC 1233).

In the case of P. Mahendra (Supra), it is observed as under:-

"5. It is well settled rule of construction that every statute or statutory Rule is prospective unless it is expressly or by necessary implication made to have retrospective effect. Unless there are words in the statute or in the Rules showing the intention to affect existing rights, the Rule must be held to be prospective. If a Rule is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. In the

absence of any express provision or necessary intendment, the rule cannot be given retrospective effect except in matter of procedure. The amending Rule of 1987 does not contain any express provision giving the amendment retrospective effect nor there is anything therein showing the necessary intendment for enforcing the Rule with retrospective effect. Since the amending Rule was not retrospective, it could not adversely affect the right of those candidates who were qualified for selection and appointment on the date they applied for the post, moreover as the process of selection had already commenced when the amending Rules came into force. The amended Rule could not affect the existing rights of those candidates who were being considered for selection as they possessed the requisite qualifications prescribed by the Rules before its amendment. Moreover, construction of amending Rules should be made in a reasonable manner to avoid unnecessary hardship to those who have no control over the subject matter".

11.In this background, the court made observations that a candidate merely by making applications does not acquire any right to the post. It is true that a candidate does not get any right to the post by merely making an application for the same, but a right is created in his favour for being considered for the post in accordance with the terms and conditions of the advertisement and the existing recruitment rules. If a candidate applies for a post in response to advertisement issued by Public Service Commission in accordance with recruitment rules, he acquires right to be considered for selection in accordance with the then existing Rules. This right cannot be affected by amendment of any Rule unless the amending Rule is retrospective in nature. In the instant case, the Commission had acted in accordance with the then existing rules and there is no dispute that the appellants were eligible for appointment, their selection was not in violation of the Recruitment Rules. The Tribunal in our opinion was in error in setting aside the select list prepared by the Commission".

In the case of N.T. Bevin (Supra), it is observed as under:-

"14. In the instant case, para 11 of the Government order dated 9th July 1975 made the Government's intention clear that the revised directions which were contained in that Government order would not apply to the selections in respect of which advertisement had already been issued, therefore, the mode of selection as contained in Annexure 2 to the Government order dated 9th July 1975 was not applicable to the selection for filling the 50 posts of Tehsildars pending before the Public Service Commission. We are, therefore, of the opinion that the select list including the additional list as prepared by the Commission and published in March 1976 was legal and valid and the State Government wrongly refused to approve the same. The State Government's order dated 23rd April 1976 directing the Commission to prepare fresh list in accordance with the mode of selection as contained in Annexure 2 to the Government Order dated 9th July 1975 was illegal, consequently the select list prepared afresh by the Commission pursuant to the directions of the State Government is not sustainable in law. Since the additional list prepared by the Commission contained the names of the appellants, they were entitled to appointment to the posts of Tehsildars....."

From the above judgments, it is clear that unless it is made clear in the statute or statutory Rule that the same is to be operative with retrospective effect, it is to be held a prospective one. Even if a statute or statutory Rule specifically provides for its retrospective effect, then also it would not affect the one whose vested right has been created and is likely to be adversely affected.

In the instant case, when the petitioner was appointed, he was having necessary qualifications. He was initially appointed on probation for two months on work-charged establishment. On completion of the probation period, his appointment was made on long term. It is not the case of Department that he was not holding the qualifications, which were initially required for appointment on that post. It is also not the case of the Department that requirements made in the appointment order at Annexure A are also not fulfilled. However, vide Annexure C, certain additional qualifications for the post of Tracer were prescribed with effect from 7.2.84. Petitioner, it appears, could not satisfy the

said requirement and the order of termination came to be passed. These additional qualifications were made applicable after the petitioner completed the probation period and was appointed on a long term basis. Thus, in view of the orders at Annexures A & B, vested right was created in favour of the petitioner, which cannot be taken away by making or providing additional qualifications vide Annexure C and when the order at Annexure D came to be passed on the basis of Annexure C, the said order is bad and liable to be quashed and set aside. Hence, the order at Annexure D is contrary to the provisions of Articles 14 and 16 of the Constitution of India, being discriminatory, arbitrary and violative of the vested rights vide Annex. 'B' of the petitioner and is liable to be struck down and is hereby struck down.

In the result, the petition is allowed. The order at Annexure C dated 7.2.84, being Office Order no.28 of 1984, and order at Annexure D, being Office Order no.60 of 1984, are hereby quashed and set aside. By virtue of the interim relief, the petitioner continues in service and he shall continue in service in view of the order passed in this petition. Rule made absolute. No costs.
